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Afterword: and forward – there remains so much  
we do not know

HILARY CHARLESWORTH AND DAVID KENNEDY

This book is hard to conclude. At the conference where the papers in this book were first presented, we abandoned any attempt to wrap up proceedings. As the conference ended, the questions prompted by the substance and style of the papers and the discussion that followed seemed so broad that we struggled simply to catalogue them.

Looking back, the effort to rethink international law by focusing on its relationship to ‘others’ was illuminating. As in any discipline, it is easy to become preoccupied by the differences *within* the field. Focusing on differences *between* international law and things it defines as other to it helped us focus more broadly on the need to think in new ways about our discipline as a whole. Moreover, we did so at a time when conventional images of international law – as ‘the law governing relations between states’ – no longer seem sufficient to describe the global governance regime. The global constitutional order is a diverse, fragmented and chaotic one, in which national and international, public and private legal regimes overlap, struggle for priority and have quite diverse impacts on the ground. We do not, in fact, have a good sociological map of the global regulatory regime – it is more than, and different to, the sum of national and international, public and private law. Looking at the relationships between the international law tradition and its ‘others’ offered a window into how much we still do not well understand, and a set of promising intellectual paths forward.

For many years, it was conventional to think of international law as the ‘other’ of international ‘politics’. Interestingly, this distinction was not prominent in our discussions. Over the last half century or more, international lawyers have worked to understand their field as continuous with the global political process – as the currency in which political legitimacy is counted, for example. For all of us, this struggle seems to have been

won. Something similar happened a century ago. For a long period, it had been conventional to worry about the relationship between international law and 'morality', and then, suddenly, this no longer seemed a relevant boundary by which to define the field. The boundary with politics seemed far more salient. Perhaps we are now witnessing a similar transition – from a time in which the boundary with politics defined the field, to a moment in which international law is preoccupied with another other – but which one?

For the participants in this conference, different 'others' were relevant. For some, it was the boundary between law and *culture*, particularly popular culture, that loomed largest. Was law another language for culture? Were the tropes of legal argument *like* those of contemporary movies? What should we make of these similarities? Or, was law fundamentally *other* to culture – a domain of power, decision, force? Should we worry when law came to imitate, or snuggle up to, cultural-forms? Should we desire a law autonomous from culture – should we fear it? Could we have it? Perhaps predictably, these questions seemed particularly salient in discussions between those of us who specialize in law, and those who see themselves primarily as analysts of culture. As in many interdisciplinary conversations, we had as much miscommunication as new insight. But, as international lawyers, once we accept that law has become a currency for communication about the legitimacy of power, we have made law a player in the domain of culture. We are convinced work along this boundary will remain significant and fruitful.

For some included here, the most significant 'other' was the world of economic affairs – of trade, private commercial relations, corporate power. Inquiry along this boundary is, in many ways, more familiar to us as lawyers – the relationship between private ordering and informal, customary ordering and the public constitutional order has been a recurrent theme in modern legal scholarship, in the field of international law as elsewhere. But the global relationship between public order and private power seems newly significant as the capacity for public policy at the local, national and international level has seemed under threat from the largely economic process of 'globalization'. Does it make sense any longer to see public international law as the star of the legal sciences – are its structures, its sources, its procedures the sinews of our global constitution, or has it become a narrow sub-speciality, a peculiar institution and profession, left over from utopian projects of another era? Is corporate law a better map of the world's constitution – if corporations govern, is not corporate governance global governance? If the debate about international law

and culture was structured by a feeling of uncanny parallels, our discussions about international law and economic power were structured more by the implicit feeling that our discipline was losing ground to an other that really was other. Placing the two inquiries together posed a different question – should we see the global economic order as other – or might we unravel the strands of relationship between public and private power, the presence of sovereign authority in private authority, as we have the relationship between international law and politics or culture?

A number of papers investigated the relationship between international law as a hegemonic global order radiating outwards from Europe and North America towards the ex-colonial world – the colonial world as ‘other’ to an international law made, packaged and sold from a headquarters in Europe. This is a rich topic, and one about which international lawyers have written extensively in the years since decolonization. For all that, it remains extremely difficult to understand. Was international law, in fact, ‘made in Europe’ for export – or is it the reverse, made in the colonial encounter for generalization at the centre and the periphery? The legal structure of relations between the strong powers and the weaker periphery today is uncannily similar to the structure that characterized the League of Nations mandate period – and the initial seventeenth-century colonial encounter. What are we to make of these similarities? Our participants differed greatly on this – is international law ‘imperial’, and, if so, as a matter of logic, of language, of prejudice or of sociology? Does it just ‘get used’ that way – or is there a ‘logic of domination’ in the disciplinary imagination and materials? How persistent is this prejudice – is this a system, a structure, an imperative or simply a tendency to be watched, attended to, overcome? Again, a powerful set of questions to which we less found answers than sketched paths for further research.

The relationship between international law and warfare was on all our minds during the conference. Was international law about peace, a discipline designed to alleviate the violence and reduce the incidence of war? Was warfare really, as we had always hoped, ‘other’? One might think it unfortunate that international law continued to think of culture, or economic life, or peripheral nations and peoples as its ‘other’. In these fields, one might seek to bridge the gap, as we had done with politics – illuminating the connections between what we knew to be law, and what we had thought to be its ‘other’. But war? Surely we should retain the project to stand outside war, limiting it, denouncing it, constraining it. It turns out that international lawyers have long since left this vision behind. The tradition of humanitarian law is all about infiltrating military

decision-making, developing rules and standards that can be slipped into the calculations of those who make war. The result has been, for better or worse, a merger of the international legal profession with the modern machinery of warfare. Several of the papers explore what was gained and lost by this merger between international law and one of its 'others', professionally and personally, as well as ethically and strategically. Thinking about international law *implicated* in warfare was also a useful heuristic, suggesting attention to law's implication in other practices that it also retained the vocabulary to denounce. Is the international law of human rights part of the problem, as well as the solution? Does international refugee law also contribute to the incarceration of the world's peoples in national boundaries?

Culture, economic power, the periphery, warfare – these were not the only counter-images to international law explored at the conference. We repeatedly discovered links and parallels between international law and domains that might have seemed alien to it: theology, mercy, sacrifice, terror, sex, gender, humanity, erotics, philosophy, justice, fetish, redemption, bodily flesh. International law has attitudes about these things, about their distance, their similarity, their potential, their peril. International law influences these things, and is influenced by them. Each of the authors took up the theme in her or his own way – but there were methodological overlaps as well. For some, the inquiry was primarily sociological – an exploration of cause and effect, of the relations in the world between international law, defined as an institution, a profession, a normative regime, and the real world of colonial resistance, private economic power, military professionalism, erotic life. For others, the inquiry was one of meaning, logic, imagery – an analysis of the common rhetorical and cultural forms present in the discourses of international law and those of colonialism, trade, war or gender. These approaches overlapped, bled into one another – but sometimes they also conflicted.

The more we looked at international law and its others, the less clear it became that the 'international law' we were talking about was the same thing. There turns out to be more than one international law – not just the international law imagined by Europeans, by Africans, by United Statesians, by Australians, but also the international law preoccupied with war, with economic power, with erotic life. In a radically pluralist legal culture, the professional her or himself comes quickly into sharp view. It no longer seems so plausible to imagine the international lawyer simply speaking or applying or serving 'the law' – with legal pluralism, what had seemed legal judgments come into sharp relief as personal decisions. Indeed, the

conference raised the issue of the way in which international law can be understood as a series of professional performances rather than an edifice of ideas and doctrines.

Elaborating the relationship between international law and its others also allowed us to glimpse the *quotidian* practices of the discipline – its routine involvement in war, in poverty, in cultural life. Normally, international lawyers specialize in crises. Our sense that we are living through a momentous period in history is permanent. We will always feel as though there is something peculiarly challenging and significant about *this* moment in international law and that the core of our discipline is somehow under threat. The exceptional nature of each new situation provides a stimulating sense of danger.

One example of performance is the way academic international lawyers responded to the invasion of Iraq in 2003. This performance must be read in the context of the sense of insecurity that dogs international lawyers. In the academy we tend to be considered purveyors of a rather suspect form of legal reasoning and incapable of distinguishing between true law on the one hand and politics on the other. The role of international law in the academic curriculum is thus endlessly debated – is it central or peripheral to the core business of a law school?

The lead-up to the invasion of Iraq and the response to it made international lawyers everywhere feel as though they were at the heart of the action. We were relevant at last, because of the unusual public interest in whether or not the invasion was legal. For a time at least, the press, colleagues, students and the general public seemed interested in the views of international lawyers. Australian, Canadian and British international lawyers wrote public letters questioning the legal basis for war that attracted political attention. This thrill of attention and relevance, of talking law to power, was however tainted by a sense of deepest irrelevance. Whatever the views of most international lawyers that the invasion was illegal, the members of the 'Coalition of the Willing' proceeded to invade Iraq on the basis of what seemed to be very weak, perhaps even ironic, legal advice.

Was the invasion of Iraq good news or bad news for international law and its practitioners? The options proposed by international lawyers include vigorous restatement of the basic principles of the Charter of the United Nations<sup>1</sup> and retention of the moral high ground, awaiting the

<sup>1</sup> San Francisco, 26 June 1945, in force 24 October 1945, UKTS (1946) 67.

day when they will again attract politicians;<sup>2</sup> developing legal principles that are better attuned to political agendas to increase the chance that they will be observed;<sup>3</sup> exploring (and celebrating) the informal amendment of the cumbersome structures of the UN Charter relating to the use of force;<sup>4</sup> and accepting and living with the intellectual and emotional pendulum between commitment and cynicism inherent in the practice of international law.<sup>5</sup>

The long-term significance of the dissonance between international legal principle and political action in the case of the invasion of Iraq may well be its puncturing of the myth of the reasoned effectiveness of international lawyers. The search for a causal link between international law and political action can be seen to be unproductive and the image of speaking law to power a conceit. The invasion of Iraq may lead us to describe a more complex role for international law: it can have a powerful impact, but not in the ways we are taught to expect or acknowledge.

One way to better understand the relationship between international law and foreign policy is through the idea of 'extravascular projects'. This requires studying the dark, non-progressive side of international law to challenge the dominant narratives of progress and development in the discipline. The standard focus of international lawyers is on humanitarian objectives – the protection of human rights or the environment, for example. It may be more useful however to ask what international law offers to people who want to violate international law and to investigate how international law is implicated in the problems we have set out to solve.

Extravascular projects can assist us to see the way that principles of international law may work to obscure injustices. In the case of Iraq, for example, we might ask how international law was deployed to construct Iraq as an appropriate place to invade. How did the international law of sanctions, of no-fly zones, of 'oil for food' programmes contribute to the creation of 'Iraq – The Problem'? A Security Council resolution explicitly

<sup>2</sup> For example, Thomas M. Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *American Journal of International Law* 607 at 620.

<sup>3</sup> For example, Michael J. Glennon, 'Why the Security Council Failed' (2003) 82(3) *Foreign Affairs* 16 at 30–5.

<sup>4</sup> For example, Carsten Stahn, 'Enforcement of the Collective Will after Iraq' (2003) 97 *American Journal of International Law* 804.

<sup>5</sup> For example, Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York, 1999), pp. 495–523.

authorizing the use of force against Iraq would have met the requirements of Chapter VII of the UN Charter and rendered the invasion legal in a formal sense, although the resolution may have been the product of economic coercion of some of the non-permanent members of the Security Council. The sense that action can be legal but illegitimate prompts the question of why international law pays so little attention to economic disparity between states and insists on a fiction of equality as international actors.

A related strategy would be to consider principles of international law from the perspective of their objects. For example, claims of humanitarian intervention could be studied from the viewpoint of the people on whose behalf the intervention took place. The international interventions in Kosovo, East Timor, Afghanistan and Iraq would take on a more complex hue when examined from inside the 'rescued' communities. The pattern of association of humanitarian intervention with economic subjugation of the saved group would become clearer.<sup>6</sup> This type of inquiry would destabilize the stock of images deployed in international law, such as the Third World as chaotic and uncivilized and the West as a scion of democracy.

International law could be productively studied as myth and ritual in the international community and within nation-states: what are its codes and its fetishes? Why is intervention typically understood as having a military form; what other forms of intervention are possible? What of the fantasy realm that lies behind international law? Should we move beyond international law's juridical model of power and investigate how its narratives affect our imaginations and emotions?<sup>7</sup> What professional and personal performances are involved in the practice of international law? Invocation of international law can often more effectively galvanize civil society than the makers of foreign policy, and understanding the hopes and desires woven into the fabric of international law can help explain this.

The deep sense of disquiet held by many international lawyers about the invasion of Iraq may lead to a new disciplinary self-image, a recognition of the dark sides of humanitarian impulses. Instead of seeing ourselves as wise and sometimes heroic counsellors speaking truth/law to power, hoping that one day we will be heard and that our advice will be taken,

<sup>6</sup> Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge, 2003), chapter 4.

<sup>7</sup> *Ibid.*, p. 77.

we should accept that we will only ever have a minor direct impact on the generation of foreign policy. At the same time, we have considerable power in shaping the way problems are identified, categorized and resolved at the international level. We are active participants in intensely political and negotiable contexts and we must confront this responsibility without sheltering behind the illusion of an impartial, objective, legal order.